

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE JOHN HEFFER TRUST,	:	DETERMINATION
JAMES G. ROSENBERG, TRUSTEE	:	DTA NO. 820351
	:	
Redetermination of a Deficiency or for Refund of Personal	:	
Income Tax under Article 22 of the Tax Law for the Years	:	
2000, 2001 and 2002.	:	

Petitioner, The John Heffer Trust, James G. Rosenberg, Trustee, c/o Saul Ewing, Attorneys at Law, 1500 Market Street, 38th Floor, Philadelphia, Pennsylvania 19102, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2000, 2001 and 2002.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 12, 2005 at 10:30 A.M., with all briefs submitted by January 4, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Roberts & Holland LLP (Joseph Lipari, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the resignation of a New York domiciled trustee of a New York resident trust, without court approval, was sufficient to satisfy the requirements of 20 NYCRR former

105.23(c), such that petitioner trust was no longer subject to New York personal income tax and was entitled to a refund of taxes paid for the years 2000, 2001 and 2002.

FINDINGS OF FACT

On October 4, 2005 and October 6, 2005, the Division of Taxation and Petitioner, respectively, entered into a Stipulation of Facts which contained 19 findings of fact which have been incorporated into the facts below.

1. The John Heffer Trust (the “Trust”) was established by a Trust Agreement, dated March 21, 1973, between Jacob M. Seiler (the “grantor”) and Jacob M. Seiler, Muriel P. Seiler and Sidney J. Silberman (the “Trustees”).

2. The beneficiary of the Trust was the grantor’s stepson, John Heffer, who, under the terms of the Trust, received the income therefrom and, in the discretion of the Trustees, payments from principal as well.

3. On November 20, 1981, the Trustees executed a document entitled Appointment of Successor Trustee by which Jane Heffer Galluzzo was appointed successor trustee to act upon the occurrence of a vacancy in the office of Trustee.

4. Article “TENTH” of the Trust Agreement provided as follows:

The Trustees (or Trustee) acting from time to time are authorized to appoint one or more additional Trustees or to designate a successor Trustee or successor Trustees to act upon the occurrence of a vacancy. If no one designated pursuant to this article is available to act, the beneficiary is authorized to appoint one or more Trustees.

* * *

Any Trustee may resign by giving notice to take effect on the date specified in said notice.

A Trustee may resign or qualify only by a written and acknowledged instrument mailed or delivered to the Grantor, if living, or if the Grantor is not living to the acting Trustees or Trustee, or if there is no other acting Trustee to a Beneficiary

5. On November 20, 1981, Sidney J. Silberman executed a document entitled “RESIGNATION,” which stated that he resigned as a Trustee of the Trust to be effective on the date a certain Release and Indemnity was fully executed. Said Release and Indemnity was executed by Jacob M. Seiler, Muriel P. Seiler and John Heffer on November 20, 1981 in consideration of Sidney J. Silberman’s consent to refrain from preparing an account of the transactions of the Trust and from having it judicially settled in order to avoid the expense and delay incident to a judicial settlement thereof.

6. Sidney J. Silberman did not seek court approval for his resignation as Trustee.

7. After the execution of the Resignation and Release and Indemnity, Sidney J. Silberman performed no other actions on behalf of the Trust.

8. On December 17, 1981, Jane Heffer Galluzzo executed a document entitled “ACCEPTANCE OF TRUST,” whereby she accepted her appointment as a Trustee of the John Heffer Trust.

9. Muriel P. Seiler, one of the original Trustees, died on February 12, 1984, and Jacob M. Seiler, another of the original Trustees, died on May 15, 1990.

10. Jane Heffer Galluzzo executed a document entitled “DESIGNATION OF ADDITIONAL TRUSTEE,” dated July 2, 1991 and acknowledged on July 15, 1991. The Designation stated that Jane Heffer Galluzzo, as the sole presently acting Trustee, designated James G. Rosenberg as an additional Trustee.

11. James G. Rosenberg acknowledged receipt of this designation on July 18, 1991, executed a document entitled “ACCEPTANCE OF TRUST” on the same date and agreed to act as Trustee of the John Heffer Trust.

12. On August 29, 2003, Sidney J. Silberman, one of the original Trustees, died.
13. The Trust timely filed a New York income tax return (Form IT-205) for the year 2000 and paid \$105,968.00, the amount of tax shown as due on the 2000 return.
14. The Trust timely filed a New York income tax return for the year 2001 and paid \$6,080.00, the amount of tax shown as due on the 2001 return.
15. The Trust timely filed a New York income tax return for the year 2002 and paid \$96,315.00, the amount of tax shown as due on the 2002 return.
16. On March 4, 2004, the Trust timely filed amended income tax returns for tax years 2000, 2001 and 2002 seeking a refund of the entire amounts paid for each of said tax years.
17. In each of the years in issue, 2000, 2001 and 2002, the entire corpus of the Trust consisted of securities invested with investment advisors at Neuberger Berman, First Manhattan Co. and Sanford C. Bernstein & Co., LLC.
18. All income and gains for the years in issue were derived from sources outside of New York State.
19. During the years 2000, 2001 and 2002, James G. Rosenberg was a Pennsylvania domiciliary and Jane Heffer Julius (formerly Jane Heffer Galluzzo) was a Connecticut domiciliary.
20. By letter, dated July 16, 2004, from Anastasia Kelleman, Tax Technician 1, of the Income/Franchise Desk Audit Bureau, the Division of Taxation ("Division") advised petitioner that the refund requests had been denied for the following reason:

The original agreement indicates the grantor was a New York State resident and the surviving original trustee is Sidney J. Silberman (NYS resident). New York State does not recognize successor trustees without court approval. Therefore, the trust does not meet the conditions of Regulation 105.23(c)(1) as explained in our Office of Counsel, File No. LBW-7353, dated December 5, 2001 (copy enclosed). This trust is being held as a resident trust with a New York State filing requirement.

CONCLUSIONS OF LAW

A. Tax Law § 601(c) imposes an income tax on resident estates and trusts. A resident trust is defined in Tax Law § 605(b)(3)(C) as

a trust, or portion of a trust, consisting of the property of:

- (i) a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or
- (ii) a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.

Since the John Heffer Trust fell within this definition of a resident trust it was subject to the tax imposed by Tax Law § 601(c).

B. The Division's regulation at 20 NYCRR former 105.23¹ set forth an exception to the imposition of income tax on resident trusts:

(c) The determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided, however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

- (1) all the trustees are domiciled in a state other than New York State;
- (2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and
- (3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

As recited in the facts, the parties agree that the conditions contained in 20 NYCRR 105.23(c)(2) and (3) were satisfied.

¹The provisions of this regulation, in effect for the years in issue, are now contained in Tax Law § 605(b)(3)(D)(i), which was effective for all tax years beginning on or after January 1, 1996.

C. The Division contends that Sidney J. Silberman, a New York resident, never resigned from his position as Trustee, and therefore, the Trust remained taxable as a resident trust because one of its Trustees was domiciled in New York.

The Division relies on provisions of the New York Estates Powers and Trusts Law (hereinafter “EPTL”) for its position that a trustee can only resign with a court order therefor. (EPTL 7-2.6.) The Division notes that the provisions of EPTL 7-2.6 do not specifically and directly address themselves to inter vivos trusts, but contends that this omission does not exclude the provisions from extending to inter vivos trusts with clear provisions for the resignation of trustees. In support of this contention, the Division cites *Matter of Lasdon* (NYLJ, July 22, 2005, at 29, col 2), in which the Westchester County Surrogate’s Court specifically addressed the petition to resign of a trustee in an inter vivos trust, stating that such an application “rests in the sound discretion of the court.”

Although it is true that surrogate’s courts and supreme courts have jurisdiction over inter vivos or lifetime trusts in certain instances (SCPA 207[1]; 209[6]²; CPLR 7701), it does not follow that it is mandatory for a trustee to seek permission to resign from these courts. In the case of a lifetime trust, a circumstance may arise where all persons serving as trustee die or are removed, without any successor having been appointed pursuant to the terms of the trust instrument. In such a case, a petition *may* be brought to the surrogate’s court or supreme court in the proper jurisdiction and a successor trustee appointed. (SPCA 706[2].) However, as noted in the practice commentary following SCPA 709, written by Professor Margaret Valentine Turano

²Surrogate’s Court Procedure Act is referred to as “SCPA”.

of St. John's Law School, the surrogate's court was given jurisdiction over lifetime trusts in 1980. Professor Turano stated:

[i]n practice, lifetime trusts are usually not under court supervision until some need for it arises, and the court does not usually issue letters unless no trustee was named and the court has to appoint one, or unless the trustee has ceased to serve and the court has to appoint another.

This commentary is consistent with SCPA 724, which provides that Article 7 of the SCPA, General Provisions Relating to Letters, is not applicable to lifetime trusts.

D. In this matter, the provisions of the John Heffer Trust were clear with respect to resignations of Trustees and the appointment of successor Trustees. Sidney J. Silberman followed the provisions of Article TENTH of the Trust, giving notice to the grantor and providing the date said resignation was to take effect, i.e., November 20, 1981. The Trustees also followed the terms of Article TENTH and appointed Jane Heffer Galluzzo as a successor Trustee. Since Sidney J. Silberman never possessed letters of trusteeship there was no need for a court proceeding to revoke them, and he resigned and was relieved of his duties by his resignation and the Release and Indemnity, both executed on November 20, 1981. (SCPA 709, 724.)

E. EPTL 7-2.6 gives the supreme court jurisdiction to accept the resignation of a trustee and discharge him of his duties. (EPTL 7-2.6[a][1].) In addition, the section gives the supreme court the authority to appoint a successor trustee. (EPTL 7-2.6[a][3].) However, this apparent inconsistency with the sections of the SCPA discussed above is resolved in the final sentence of the EPTL 7-2.6, which provides that the section does not apply "where other provision is made by law for the resignation, suspension or removal of a trustee or the appointment of a successor trustee."

To the extent that EPTL 7-2.6 applies to an inter vivos trust, the section addresses itself to those circumstances where a trustee has chosen to make an application to the supreme court for the relief set forth therein. Both subsections (1) and (2) of EPTL 7-2.6 begin with the words “on the application of . . .” indicating that *if* those circumstances present themselves, the supreme court has the jurisdiction and authority to entertain such petitions or applications. This does not prohibit a trustee from acting pursuant to the resignation provisions of the trust document, and there is no language in the section which could faintly be termed mandatory. As argued by petitioner, such a reading of EPTL 7-2.6 would be inconsistent with the supreme court’s concurrent jurisdiction with the surrogate’s court, which does not require a lifetime trustee to petition it in order to resign where provisions of the trust document provide for a trustee’s resignation and the appointment of a successor.

F. The Division’s reliance on *Matter of Lasdon (supra)* is misplaced. Although that case involved the Westchester County Surrogate’s Court’s granting a trustee’s petition to resign pursuant to SCPA 715 and the appointment of a successor trustee in an inter vivos trust, the trustee, J.P. Morgan Chase, had been granted letters of trusteeship which needed to be revoked by court order. That circumstance does not present itself in the instant matter, where letters of trusteeship were never issued and the trust instrument itself adequately provides for the resignation of a trustee and the appointment of a successor. Further, there was no explanation offered by the Court in *Lasdon* as to why J.P. Morgan Chase originally petitioned for letters, but letters are conclusive evidence of the authority of a trustee to whom they are granted and remain in effect until revoked or modified by the court which granted them. (SCPA 703[1].) Therefore, an application to the Court was imperative in *Lasdon*.

Finally, those cases relied on by the *Lasdon* court (*Matter of Wagner*, NYLJ, January 14, 1999, at 35, col 5; *Matter of Busto's Will*, 173 Misc 25 *affd* 258 App Div 980) involved testamentary trusts and, as such, are inapplicable to this matter. Insofar as there were letters to be revoked in *Lasdon*, establishing an identity with testamentary trusts, the Court was well grounded in its reliance on *Matter of Wagner* and *Matter of Busto's Will*. However, no such similarities exist with the present matter.

G. The SCPA and the EPTL do not prohibit or impair the creation of inter vivos trusts which contain valid provisions for the resignation of trustees and the appointment of successor trustees without court approval. The John Heffer Trust clearly prescribed procedures for the resignation of a trustee and the appointment of successor trustees which were carefully followed in accordance with the intent of the grantor, thereby giving legal effect to the resignation of Sidney J. Silberman on November 20, 1981.

Therefore, for the years 2000, 2001 and 2002, petitioner has established that it met the requirements of 20 NYCRR 105.23(c) and was not subject to income tax.

H. The petition of The John Heffer Trust is granted and the Division is directed to refund the entire amounts of tax paid as requested in the amended fiduciary income tax returns for the years 2000, 2001 and 2002, timely filed March 4, 2004.

DATED: Troy, New York
June 22, 2006

/s/ Joseph W. Pinto, Jr. _____
ADMINISTRATIVE LAW JUDGE